

Before the
Federal Communications Commission
Washington, D.C. 20054

FILED/ACCEPTED

SEP 24 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Service Rules for the 698-746, 747-762	)	WT Docket No. 06-150
and 777-792 MHz Bands)	
)	
Revision of the Commission's Rules to	)	CC Docket No. 94-102
Ensure Compatibility with Enhanced 911)	
Emergency Calling Systems)	
)	
Section 68.4(a) of the Commission's Rules	)	WT Docket No. 01-309
Governing Hearing Aid-Compatible)	
Telephones)	
)	
Biennial Regulatory Review – Amendment	)	WT Docket No. 03-264
of Parts 1, 22, 24, 27, and 90 to Streamline)	
and Harmonize Various Rules Affecting)	
Wireless Radio Services)	
)	
Former Nextel Communications, Inc.	)	WT Docket No. 06-169
Upper 700 MHz Guard Band Licenses and)	
Revisions to Part 27 of the Commission's)	
Rules)	
)	
Implementing a Nationwide, Broadband,	)	PS Docket No. 06-229
Interoperable Public Safety Network in the)	
700 MHz Band)	
)	
Development of Operational, Technical	)	WT Docket No. 96-86
and Spectrum Requirements for Meeting)	
Federal, State and Local Public Safety)	
Communications Requirements Through)	
the Year 2010)	
)	
Declaratory Ruling on Reporting	)	WT Docket No. 07-166
Requirement under Commission's Part 1)	
Anti-Collusion Rule)	

PETITION FOR RECONSIDERATION

Martin L. Stern
Brendon P. Fowler
Kirkpatrick & Lockhart Preston Gates Ellis LLP
1601 K Street, N.W.
Washington, D.C. 20006-1600
(202) 778-9000

September 24, 2007

Attorneys for Pierce Transit

No. of Copies rec'd 0
List ABCDE

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
SUMMARY.....	ii
I. INTRODUCTION AND BACKGROUND.	3
A. Pierce Transit and Its 700 MHz System.	3
B. The Second Report and Order.....	4
II. THE COMMISSION’S CAP ON RELOCATION COSTS SHOULD BE ELIMINATED AS UNREASONABLE.	6
A. Commission Precedent Has Long Held That a Cap Is Unnecessary and Inappropriate.	7
B. The Commission Acted Arbitrarily and Capriciously When It Overturned Its Precedent Without Discussion or Explanation.	9
C. Motorola’s Estimates Are an Inadequate Basis for Establishing the \$10 Million Cap.	10
III. HALTING CONSTRUCTION AND DENYING REIMBURSEMENT FOR SYSTEMS THAT ARE IN THE MIDST OF DEPLOYMENT AS OF THE AUGUST 30 DEADLINE WOULD BE MANIFESTLY UNJUST.	12
A. The Commission Violated the APA When It Gave Pierce Transit Only a Few Weeks to Comply With an Order Dramatically Affecting a 700 MHz System Under Design and Build-Out for Over a Year.	12
B. Equities Demand That Pierce Transit Be Permitted to Continue Deployment of Its System, and Receive Reimbursements for Any Relocation Costs.	14
IV. CONCLUSION.....	17

SUMMARY

On August 10, 2007, the Federal Communications Commission (the “Commission”) released its Second Report and Order in the 700 MHz proceeding, revising the 700 MHz band plan and service rules in order to help establish a nationwide, interoperable broadband communications network for public safety users and to facilitate new wireless broadband services. As part of the Second Report and Order, the Commission, among other things, designated the lower half of the 700 MHz public safety band for broadband communications, and consolidated the existing narrowband allocations in the upper half of the 700 MHz public safety band. These actions require reconfiguration of the operations of existing 700 MHz public safety licensees, such as petitioner Pierce Transit.

In reconfiguring the 700 MHz Band, the Commission recognized the importance of protecting the operations of 700 MHz public safety licensees and, consistent with long-standing Commission precedent, of ensuring that they are made whole for the costs incurred in connection with this forced relocation. Nonetheless, the Second Report and Order (1) imposed a \$10 million aggregate cap on all reimbursements payable to incumbents subject to relocation; (2) established a deadline of August 30, 2007 as a cut-off date for new narrowband operations in the reconfigured broadband frequencies, and (3) limited relocation reimbursements to only that equipment that is deployed and in use as of the August 30 date.

As a municipal corporation responsible for public transit to cities and towns in and around Pierce County, Washington, Petitioner has been and will continue to be unjustly harmed by these three aspects of the Second Report and Order. Pierce Transit is in the midst of deploying a new 700 MHz narrowband radio system, which is intended to enhance public safety for its over 16,000,000 riders and 900 operators. Its project has been underway since March 1,

2006, when Pierce Transit contracted with Motorola for a new \$31 million voice and data system to support its transit operations in the Puget Sound region, which would replace a 17 year old 900 MHz system that is experiencing multiple failures. The 700 MHz radio system design was completed late in 2006 and the equipment was shipped and paid for by the end of December 2006. Pierce Transit was literally in the middle of bringing the new system online, with 3 of 6 radio sites operational, when the Commission's deadline fell. Deployment of more than 650 mobile and portable radios is scheduled between November 2007 and June 2008.

As more fully explained herein, the Commission ignored long-standing precedent and policy when it established the \$10 million cap on reimbursements based solely on the estimates of a single manufacturer, and acted unreasonably when it established extremely short deadlines for compliance with its Second Report and Order. In particular, the prohibition on the deployment of any new narrowband equipment in the broadband frequencies after August 30 would bring Pierce Transit's project to a halt.¹ Particularly unjust is the requirement in the Second Report and Order that reimbursement eligibility be tied to equipment "actually deployed and operational" by the August 30 deadline. That deadline makes no allowance for parties like Pierce Transit who have paid for and taken delivery of systems that were under construction when the deadline fell. As a public agency, Pierce Transit can only expend authorized funds for a project such as its 700 MHz system. In the event that the Commission does not allow reimbursement for equipment that has been paid for but not deployed as of August 30, there is significant uncertainty as to whether Pierce Transit could even obtain the authorization needed or

¹ Pierce Transit has filed a waiver request with the Public Safety and Homeland Security Bureau to allow it to continue deployment of its system, and to obtain reimbursement for equipment deployed after August 30th. While the waiver request remains pending, the Bureau advised Pierce County that it should nonetheless continue with its deployment plans.

receive the funds necessary to pay for the relocation, which would have to be funded through voter-approved local sales tax increases.

Thus, absent relief, Pierce Transit now finds itself in the untenable position of having a partially completed and partially operational 700 MHz system that it cannot fully construct and operate and for which it may not be entitled to reimbursement. This would be a manifestly unjust result flatly at odds with years of Commission policy requiring incumbents to be made whole in connection with any required relocation. Nor is this an isolated case, as reflected in recent waiver petitions filed by the States of Colorado and Louisiana that address similar circumstances faced by numerous public safety 700 MHz incumbents in those jurisdictions.

Accordingly, Petitioner urges the Commission reconsider the Second Report and Order by: (1) removing the \$10 million cap; (2) making clear that parties can continue to construct systems that have already been purchased and are in the process of deployment after the August 30 deadline; and (3) allowing full reimbursement for the relocation of all such systems.

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of)	
)	
Service Rules for the 698-746, 747-762	)	WT Docket No. 06-150
and 777-792 MHz Bands)	
)	
Revision of the Commission's Rules to	)	CC Docket No. 94-102
Ensure Compatibility with Enhanced 911)	
Emergency Calling Systems)	
)	
Section 68.4(a) of the Commission's Rules	)	WT Docket No. 01-309
Governing Hearing Aid-Compatible)	
Telephones)	
)	
Biennial Regulatory Review – Amendment	)	WT Docket No. 03-264
of Parts 1, 22, 24, 27, and 90 to Streamline)	
and Harmonize Various Rules Affecting)	
Wireless Radio Services)	
)	
Former Nextel Communications, Inc.	)	WT Docket No. 06-169
Upper 700 MHz Guard Band Licenses and)	
Revisions to Part 27 of the Commission's)	
Rules)	
)	
Implementing a Nationwide, Broadband,	)	PS Docket No. 06-229
Interoperable Public Safety Network in the)	
700 MHz Band)	
)	
Development of Operational, Technical	)	WT Docket No. 96-86
and Spectrum Requirements for Meeting)	
Federal, State and Local Public Safety)	
Communications Requirements Through)	
the Year 2010)	
)	
Declaratory Ruling on Reporting	)	WT Docket No. 07-166
Requirement under Commission's Part 1)	
Anti-Collusion Rule)	

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Federal Communications Commission's
("Commission") Rules, 47 C.F.R. § 1.429, Pierce County Public Transportation Benefit Area
Corporation ("Pierce Transit"), by its undersigned counsel, hereby submits this Petition for

Reconsideration of the Commission's Second Report and Order in the captioned dockets.² In particular, Pierce Transit asks that the Commission reconsider: (1) its unreasonable deadline prohibiting new narrowband operations by 700 MHz public safety incumbents outside the new 700 MHz consolidated narrowband blocks adopted in the Second Report and Order, after August 30, 2007 (the "August 30 Deadline"); (2) its decision to limit reimbursement to 700 MHz incumbents for relocation expenses associated with the migration and consolidation of incumbent 700 MHz public safety operations to radios and base stations actually deployed and in operation as of the August 30 Deadline;³ and (3) the unprecedented \$10 million cap on total relocation costs for all 700 MHz public safety incumbents (the "\$10 Million Cap").⁴

² *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al*, Second Report and Order, WT Docket No. 06-150, *et al.*, FCC 07-132 (rel. Aug. 10, 2007) ("Second Report and Order").

³ Pierce Transit filed a Request for Waiver on August 30, 2007, detailing the history of its system and the necessity of a waiver of the Commission's deadline regarding new operations and limitations on reimbursements for equipment not yet in operation. *See Pierce Transit Waiver-Expedited Action Requested*, WT Docket No. 06-150, PS Docket No. 06-229, WT Docket No. 96-86 (filed Aug. 30, 2007) (available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519721144). Pierce Transit also filed a supplemental waiver request on September 5, 2007, at the request of Commission staff. *See Pierce Transit Waiver-Expedited Action Requested, Corrected*, WT Docket No. 06-150, PS Docket No. 06-229, WT Docket No. 96-86 (filed Sept. 5, 2007) (available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519722599). In an email to Pierce Transit dated September 14, 2007, Commission staff noted that the Commission required radios deployed outside the new narrowband block to be "in operation" by the August 30 deadline "meaning deployed and in use," and that a waiver would be required to deploy any other narrowband radios after the August 30 Deadline. The email nonetheless stated that even if a waiver is required, "the agency [Pierce Transit] should continue with its existing deployment plans." Pierce Transit interpreted this to mean that it could continue to deploy its system pending action on its waiver request. To date, its waiver request remains pending, in particular as to the reimbursement of costs on radios deployed after the August 30 Deadline, thus necessitating the instant petition for reconsideration.

⁴ *See Public Notice, New Public Safety Narrowband Operations Outside of the 700 MHz Consolidated Narrowband Blocks Prohibited*, DA 07-3644 (Pub. Safety and Homeland Sec. Bureau, Aug. 16, 2007).

I. INTRODUCTION AND BACKGROUND.

A. Pierce Transit and Its 700 MHz System.

Pierce Transit is a Washington State Municipal corporation that provides public transportation in cities and towns in and around Pierce County, Washington. Pierce Transit is in the midst of deploying a new 700 MHz narrowband radio system. It is a member of the Region 43 (Washington) 700 MHz Regional Planning Committee. Its 700 MHz license, WQHJ937 (issued Aug. 17, 2007), was granted pursuant to the Region 43 700 MHz Plan, which was submitted to the Commission on February 7, 2006 and approved by the Wireless Telecommunications Bureau on June 27, 2006.⁵

Pierce Transit's project has been under way since March 1, 2006, when Pierce Transit contracted with Motorola for a voice and data system to support its transit operations in the Puget Sound region. The 700 MHz radio system design was completed late in 2006 and the equipment was shipped and paid for by the end of December 2006. Installation of its master site, prime site, and two remote sites is now complete.

Once Pierce Transit received notice that its license had been issued, Motorola immediately proceeded to start up and test the constructed sites. Civil construction activities at another remote site have been completed, with civil construction beginning on the remaining two remote sites, with those sites expected to be completed and operational by the end of October 2007. Deployment of more than 650 mobile and portable radios is scheduled between November 2007 and June 2008. At the end of this process, Pierce Transit will have over 650 subscriber radios on the air, and will be serving passengers from Olympia to Seattle.

⁵ See Public Notice, *Wireless Bureau Approves Region 43 (Washington) 700 MHz Plan*, DA 06-1322, WT Docket No. 02-378 (WTB Jun. 27, 2006).

Pierce Transit's current 900 MHz radio system is now over 17 years old and is experiencing multiple failures. At the time the current radio system was designed, the only available spectrum with sufficient capacity was in the 900 MHz band. Over the years, available spectrum in the VHF, UHF, 800 MHz and even the 900 MHz bands has become increasingly scarce, thereby preventing future expansion of the system. Even so, the availability of other spectrum is not feasible given the specific frequency requirements and operational service area of Pierce Transit.

B. The Second Report and Order.

On August 10, 2007, the Commission released the Second Report and Order, which, among other things, establishes a regulatory framework for the 700 MHz public safety band in order to help establish a nationwide, interoperable broadband communications network “for the benefit of state and local public safety users.”⁶ The Commission designated the lower half of the 700 MHz public safety band for broadband communications, and consolidated the existing narrowband allocations in the upper half of the 700 MHz public safety band, requiring reconfiguration of the operations of existing 700 MHz public safety incumbents, such as Pierce Transit. The Commission found that its rebanding plan was “in the public interest” and that the new broadband services would “play an essential role in the ability of public safety entities, especially first responders, to fulfill their mission to protect the health, welfare and property of the public.”⁷ Similarly, the Commission found that the relocation of existing narrowband allocations would “promote the benefits of the 700 MHz Public/Private Partnership.”⁸ The

⁶ Second Report and Order, ¶ 322.

⁷ *Id.*, ¶ 325.

⁸ *Id.*, ¶ 329.

Commission, however, recognized the importance of protecting the operations of 700 MHz incumbents and, consistent with long-standing Commission precedent, ensuring that they are made whole for the costs incurred in connection with this forced relocation.

Yet the Commission's Second Report and Order has caused and will continue to cause manifest injustice to the very state and local public safety users the Commission seeks to assist. The decision ignores established Commission precedent on reimbursing incumbent relocation costs. It will have significantly harm incumbents, such as Pierce Transit, that are in the midst of deployment, but have not actually turned on their equipment by the August 30 Deadline. Under the Second Report and Order, these incumbents are left with no ability to recoup costs for equipment already delivered and paid for but that will become operational after the August 30 Deadline.

As a public agency, Pierce Transit has not had funds available for the project until recently. This project is the largest capital project ever undertaken by the agency and delays incurred while new channels are assigned could delay its efforts by 6 to 10 months. Delay costs alone could exceed \$500,000 and the costs to reconfigure the system, even if authorized by the agency's Board of Commissioners, could only be paid for through voter-approved increases in local sales taxes were Pierce Transit not eligible for reimbursement for these costs.

Pierce Transit has acted diligently and in good faith to deploy a new 700 MHz narrowband network that was required to meet its critical communication needs in the face of a failing, aged 900 MHz communication system. It actively participated in the Region 43 700 MHz Regional Planning Committee planning process to obtain frequency assignments that would meet its system requirements, and yet be consistent with an overall plan for Region 43. Upon finalization of that plan and its submission to the Commission, it began working with

Motorola to design the system, and have Motorola manufacture and deliver the necessary equipment – a process with a lead time to initial construction and deployment of over 18 months. It timely filed for the required 700 MHz license based on the Commission-approved Region 43 Plan, and was issued that license on August 17, 2007.

It now finds itself in the untenable position of having a partially completed and partially operational 700 MHz voice radio system and CAD/AVL data communications system for which it has paid over \$ 31 million which, under the Second Report and Order, absent relief, it cannot fully construct and operate and for which it may not be entitled to reimbursement. This would be a manifestly unjust result flatly at odds with years of Commission policy requiring incumbents to be made whole in connection with any required relocation.

Consequently, and as set forth more fully below, the Commission should reconsider its Second Report and Order by: (1) removing the \$10 Million Cap; (2) making clear that parties can continue to construct systems that have already been purchased and are in the process of deployment after the August 30 Deadline; and (3) allowing full reimbursement for the relocation of all such systems.

II. THE COMMISSION'S CAP ON RELOCATION COSTS SHOULD BE ELIMINATED AS UNREASONABLE.

In the Second Report and Order, the Commission provided no guidance as to how the \$10 Million Cap would apply to incumbent licensees. The Commission did not explain whether reimbursements would be prorated, dispensed in full until the \$10 Million Cap was reached and remaining incumbents were unable to recover, or whether some other methodology would apply. Moreover, the Commission based the \$10 Million Cap on little more than broad estimates supplied by a single equipment manufacturer and based on its own estimates of the number of

that manufacturer's deployed radios. In particular, the Commission appeared swayed to accept Motorola's cost estimate for no other reason than it "is the only one in the record, and is not disputed."⁹ Yet that very unchallenged nature of Motorola's estimate reveals the underlying issue: the \$10 Million Cap was never expressly proposed prior to the Commission's adoption of it, and no party could have reasonably anticipated the Commission would create it at all in light of the Commission's policy against caps, let alone based solely on one entity's estimates, with no other estimates in the record.

A. Commission Precedent Has Long Held That a Cap Is Unnecessary and Inappropriate.

In numerous earlier proceedings, the Commission firmly established that its policy in spectrum relocations was to "place the cost of an involuntary relocation to comparable facilities on the shoulders of the new entrant."¹⁰ Indeed, throughout various prior spectrum rebandings and auction proceedings, the Commission consistently held that the new entrant was required to reimburse the incumbent for *all* costs related to the relocation, without a cap.¹¹

More recently, the Commission elaborated on the rationale for requiring that incumbents be made whole during relocations, particularly with regard to state and local public safety entities. In the 800 MHz reconfiguration proceeding, the Commission recognized that:

⁹ Second Report and Order, ¶ 341.

¹⁰ See *Matter of Redesignation of the 17.7-19.7 GHz Frequency Band*, Report and Order, 15 FCC Rcd 13430, 13468 (2000).

¹¹ See, e.g., *Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of the SMR Systems in the 800 MHz Frequency Band*, First Report and Order, Eighth Report and Order, and Second FNPRM, 111 FCC Rcd 1463, 1510 (1995) ("the EA licensee must: (1) guarantee payment of all costs of relocating the incumbent to a comparable facility; ..."); *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825, 8830-31 (1996) ("Involuntary relocation requires that the emerging technology provider (1) guarantee payment of all costs of relocating the incumbent to a comparable facility; ...").

For practical reasons, *we cannot place the financial burden of relocation on the thousands of incumbent non-cellular 800 MHz licensees, including state and local public safety agencies with very limited resources, and expect that the interference problem would be resolved in either a timely or acceptable manner.*¹²

Of equal importance was the difficulty and danger inherent in trying to estimate a cap on band reconfiguration costs, particularly when the estimate is largely based on assumptions made by a single party:

We conclude, however, that we cannot reasonably “cap” the amount required for band reconfiguration if completing the reconfiguration process requires more than \$850 million. ... We did not undertake an *ab initio* analysis of the cost of band reconfiguration but instead carefully analyzed the data contained in the record. *In that regard we have taken careful notice of certain sensitive assumptions in Nextel’s analysis, which, if varied by only a few percent, greatly affect Nextel’s cost estimate. The one certainty that we derive from our analysis is that it would be unwise in the extreme to proceed with band reconfiguration without making it clear that Nextel is obligated to cover the entire cost thereof, with no “cap.” Thus, if we accepted any cap on Nextel’s reconfiguration cost obligations and its estimates proved low—i.e., if we capped costs at \$850 million and that amount was exhausted before the completion of nationwide band reconfiguration—a balkanized 800 MHz band would likely result, in which public safety agencies in one section of the country would operate pursuant to a revised band plan and other agencies would operate pursuant to the current, interference-ridden, band plan. This could seriously diminish public safety interoperability between NPSPAC Regions, and could also impair the ability of non-NPSPAC public safety systems to develop interoperable networks.*¹³

Yet in its Second Report and Order, the Commission appears to have simply ignored this well-reasoned precedent and completely failed to recognize and consider sensitive assumptions in Motorola’s cost estimate in the course of adopting the unprecedented \$10 Million Cap on relocation costs. The Commission superficially noted its interest in “ensur[ing] that eligible relocation costs are fully funded,” yet established the \$10 Million Cap based on the guidance of

¹² *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Red 14969, 15012-013 (2004) (emphasis added).

¹³ *Id.*, at 15064 (emphasis added) (internal footnotes omitted).

one vendor and its presumption of its sufficiency.¹⁴ As further discussed below, the Commission's presumption is unreasonable.

B. The Commission Acted Arbitrarily and Capriciously When It Overturned Its Precedent Without Discussion or Explanation.

Even with the benefit of hindsight, there is no indication in the record that the Commission intended to overturn its bedrock precedent against the use of caps in reimbursements for incumbent licensees. In the April 27, 2007 Notice of Proposed Rulemaking, the Commission indeed noted that “[p]rimary to the issue of how a relocation of public safety narrowband would occur is the determination of the costs of the relocation and how (or from whom) the costs will be covered.”¹⁵ Yet while the Commission solicited information regarding costs involved in consolidating the narrowband channels, nowhere did the Commission state or even imply that it was considering adopting a cap.¹⁶ In fact, the Commission noted that parties such as Access Spectrum and Pegasus had proposed to assume the entire cost of the reconfiguration, and compared its expected cost with that determined in the 800 MHz band reconfiguration proceeding discussed above where a cap was expressly rejected.¹⁷

¹⁴ Second Report and Order, ¶ 341. In considering the \$10 Million Cap, the Commission apparently believed that “the number of incumbents that would be impacted would be relatively small.” *Id.*, ¶ 333. In fact a review of the ULS database indicates that there are approximately 45 incumbent 700 MHz public safety licensees. Most of the licensees have one or more frequencies in each of the segments that will need to be relocated (764-767 MHz and 775-776 MHz), and many have one or more frequencies in both portions. Prior to commencing the relocation process, and receiving information directly from these licensees as to estimated relocation costs, it is simply impossible to develop a reliable, conservative estimate that does not result in a serious risk that any cap will be insufficient to cover all of the costs of relocation, many of which, at present, are completely unknown.

¹⁵ *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064, ¶ 264 (2007) (“*NPRM*”).

¹⁶ *Id.*

¹⁷ *Id.*, n.538.

An agency departing from precedent “must provide a principled explanation for its change of direction.”¹⁸ The Commission provided no such explanation. It is therefore not surprising that no parties questioned Motorola’s various estimates on the record, as there was no indication that the Commission intended to use them as the sole basis for a sweeping change to its policy. In the absence of any discussion of the purpose and rationale for abandoning its long-standing precedent, the Commission acted unreasonably when it instituted the \$10 Million Cap.

C. Motorola’s Estimates Are an Inadequate Basis for Establishing the \$10 Million Cap.

The unreasonable nature of the Commission’s determination is highlighted by the extremely general and uncertain nature of Motorola’s cost estimates, admittedly the sole basis of the Commission’s \$10 Million Cap.¹⁹ While Motorola is the major provider of public safety 700 MHz equipment, it is not the sole equipment provider to the 700 MHz incumbents, a fact largely ignored by the Commission. Moreover, with regard to the equipment Motorola does provide, the Commission noted that Motorola’s estimate of the 700 MHz radios deployed was somewhere between 750,000 and 800,000, providing a speculative range of 50,000 radios.²⁰

Motorola’s cost estimates are also notable primarily for their uncertainty and number of accompanying caveats. Motorola repeatedly states that its estimates are subject to a range of uncertain variables and based on a speculative future forecast through July of 2008.²¹

¹⁸ *Nat’l Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985); *see also Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985).

¹⁹ Second Report and Order, ¶ 341.

²⁰ *NPRM*, ¶ 264 n.537.

²¹ *See Comments of Motorola, Inc.*, WT Docket No. 06-150 (filed May 23, 2007), at 11 (“...the information available related to the extent of the deployed equipment and the costs of retuning is imperfect.”); *Motorola Ex Parte Letter*, WT Docket 06-150 (filed June 29, 2007), at 3 (“This cost estimate is necessarily an estimate based on

Further, Motorola's estimate is narrowly tailored to a specific set of costs: those associated with reprogramming installed Motorola 700 MHz equipment only.²² The amount of equipment itself is speculative; with Motorola noting that there are presently 90 transmit sites, but estimating a total of 610 by the middle of 2008.²³ This narrow estimate is a far cry from the Commission's standard policy of requiring reimbursements to incumbents for *all* costs, a fact Motorola acknowledges.²⁴ The overall speculative nature of this estimate and resultant cap is reinforced by the Commission's own determination that "total cost would equal \$5.77 million" but effectively rounding up to \$10 million in order to be "generous."²⁵

Normally, an agency rule would be arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.*"²⁶ Here, the Commission immediately runs afoul of the Supreme Court's rule by failing to give adequate notice of its consideration of the \$10 Million Cap and by basing it on nothing more than the indefinite estimates of a single manufacturer. The fact that the Commission tries to preemptively defend its decision on the grounds that Motorola's estimate was "not disputed" misconstrues the true reason the estimates were not previously

the best information available to Motorola ... information available to the extent of deployed equipment and the costs of retuning is imperfect and subject to change.").

²² *Motorola Ex Parte Letter*, at 3 ("Using a reasonable estimated average cost of \$100 to reprogram each mobile and portable radio, and \$3,000 to make necessary changes at each base transmitter site...").

²³ *Id.*

²⁴ *Id.* ("This estimate is only for the costs to reconfigure Motorola equipment and does not include any management costs or other costs that licensees and the parties actually performing the reconfiguration may determine is [sic] appropriate and reasonable to include.")

²⁵ Second Report and Order, ¶ 341.

²⁶ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added).

challenged: no party could have anticipated the Commission would take such an unreasonable action based on a single set of data, particularly when the Commission did not propose to do so.

III. HALTING CONSTRUCTION AND DENYING REIMBURSEMENT FOR SYSTEMS THAT ARE IN THE MIDST OF DEPLOYMENT AS OF THE AUGUST 30 DEADLINE WOULD BE MANIFESTLY UNJUST.

A. The Commission Violated the APA When It Gave Pierce Transit Only a Few Weeks to Comply With an Order Dramatically Affecting a 700 MHz System Under Design and Build-Out for Over a Year.

An equally unreasonable aspect of the Commission's Second Report and Order is the extremely short deadlines the decision provides. The Commission adopted the Second Report and Order on July 31, 2007, and released it on August 10th. Yet the cutoff for deployment and reimbursement was tied to the adoption date, with the Commission mandating that "any equipment deployed in [the frequencies subject to rebanding] subsequent to 30 days following the date of adoption of this Second Report and Order will be ineligible for relocation funding."²⁷ Likewise, no new narrowband operations were permitted beyond the August 30 Deadline. Public notice of this deadline was not given until August 16, 2007, and the Second Report and Order itself was not published in the Federal Register until August 24, 2007.²⁸ Indeed, under the item's more generous effective dates, the Second Report and Order will not even be effective until the later of 60 days from its publication in the Federal Register or Office of Management

²⁷ Second Report and Order, ¶ 339.

²⁸ See Public Notice, *New Public Safety Narrowband Operations Outside of the 700 MHz Consolidated Narrowband Blocks Prohibited as of August 30, 2007*, DA 07-3644, PS Docket No. 06-229, WT Docket No. 96-86 (rel. Aug. 16, 2007); *Service Rules of the 698-806 MHz Band, Revision of the Commission's Rules Regarding Public Safety Spectrum Requirements, and a Declaratory Ruling on Reporting Requirement under the Commission's Anti-Collusion Rule; Final Rule*, 72 Fed. Reg. 48,814 (Aug. 24, 2007) (to be codified at 47 C.F.R. pts. 0, 1, 2, 27, and 90).

and Budget approval of the new collection requirements in the Second Report and Order – at the earliest October 23, 2007.

The Administrative Procedure Act (“APA”) states that “[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date ...”²⁹ The purpose of the time lag required by this section is to “afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of the rules may prompt.”³⁰ Here, the Commission violated the APA by requiring compliance with a rule that was adopted on July 31, 2007 with an effective deadline date of August 30, 2007, but that was not released until August 10, 2007 and not published in the Federal Register until August 24, 2007. The Second Report and Order also contained new rules regarding issues such as the hard cap on relocation reimbursements that had not been raised or noticed in the rulemaking proceeding. Failure to comply with the 30-day publication requirement voids the rule.³¹

Yet even if the Commission had met the bare minimum 30-day publication requirement of the APA, that would not save the Commission’s unreasonable deadlines. The 30-day period contained in § 553(d) “merely establishes a minimum period of notice” and “does not authorize the use of an effective date that is arbitrary or unreasonable.”³² Given the complexity of the

²⁹ 5 U.S.C. § 553(d). None of the exemptions provided in 5 U.S.C. § 553(d) are applicable here. The Commission’s substantive rule did not grant or recognize an exemption or relieve a restriction, was not an interpretive rule or statement of policy, and the Commission did not provide and publish good cause for its narrow and unreasonable deadlines.

³⁰ *Rowell v. Andrus*, 631 F.2d 699, 703 (10th Cir. 1980).

³¹ *See, e.g., Kelly v. United States Dep’t of Interior*, 339 F. Supp. 1095, 1101-02 (E.D. Cal. 1972) (rejecting agency’s argument that regulations issued effective immediately were done so “with good cause,” and voiding regulations for violating 30-day publication requirement).

³² *National Ass’n of Indep. Television Producers and Distrib. v. F.C.C.*, 502 F.2d 249, 254 (2nd Cir. 1974) (agreeing with petitioners that new rule giving eight (8) months notice of effective date did not give television producers who had acted in reliance on prior variations of rule sufficient time to withdraw and was unreasonable).

Second Report and Order and the many issues raised therein, it was unreasonable of the Commission to set August 30, 2007 as the deadline.

B. Equities Demand That Pierce Transit Be Permitted to Continue Deployment of Its System, and Receive Reimbursements for Any Relocation Costs.

The Communications Act has long been concerned with the promotion of public safety.³³

The Commission itself noted that it was issuing its Second Report and Order in order to help establish a nationwide, interoperable broadband communications network “for the benefit of state and local public safety users.”³⁴

Pierce Transit has been working on its new 700 MHz narrowband radio system since March of 2006, when it contracted with Motorola for a voice and data system. This project is the largest capital project ever undertaken by Pierce Transit, and is critical to ensuring public safety to its bus, paratransit, and supervisor fleets, including Pierce Transit’s approximately 16,000,000 annual riders and more than 900 operators. Pierce Transit was literally in the middle of bringing the new system online, with 3 of 6 radio sites operational, when the Commission’s deadline fell. Delays occasioned by the Commission’s order could push back full implementation of Pierce Transit’s new system by anywhere from 6 to 10 months, and run up over \$500,000 in delay costs alone. The only alternative Pierce Transit now has to its partially completed 700 MHz narrowband system is its aging 900 MHz radio system, which is 17 years old and is experiencing multiple failures.

Particularly harsh is the requirement that reimbursement eligibility is tied to equipment “actually deployed and operational” by the August 30 Deadline, which makes no allowance for

³³ See 47 U.S.C. § 151 (listing as one of Communications Act’s central purposes “promoting safety of life and property through the use of wire and radio communication”).

³⁴ Second Report and Order, ¶ 322.

parties like Pierce Transit, who have paid for and taken delivery of systems that were under construction when the deadline fell. Here, as a public agency, Pierce Transit can only expend authorized funds for a project, such as its 700 MHz system. Thus, in the event that the Commission did not allow reimbursement for equipment that has been paid for but not yet deployed, payment for relocation costs would require authorization by Pierce Transit's Board of Commissioner's,³⁵ and would be implemented only through a voter-approved increase in local sales taxes on the citizens of Pierce County's cities and towns in and around the county. Indeed, there is no guarantee that Pierce Transit could even obtain the authorization needed or receive the funds necessary to pay for the relocation. This would result in a situation where the agency essentially purchased a system that, because of the Commission's decision, would be rendered inoperable, wasting the public funds expended for the deployment.

Clearly, if the Commission does nothing else in response to this Petition for Reconsideration, it must make clear that licensees like Pierce Transit, who are in the midst of deploying paid for and delivered systems, can continue their deployments and be eligible for all costs incurred in connection with the relocation, regardless of whether particular units are operational as of the August 30 Deadline. Straightforward matters of public policy and public safety dictate that Pierce Transit receive full reimbursement for the relocation of its 700 MHz system. Any other result would fail to serve the public interest.

In effect, despite Pierce Transit's best efforts in achieving and maintaining public safety through its new 700 MHz system, and acting reasonably, diligently, and in good faith throughout the process towards deployment, the Commission's Second Report and Order has trapped Pierce Transit halfway out of the gate. Pierce Transit has in effect been injured and shortchanged by its

³⁵ Pierce Transit is governed by a Board of Commissioners, which is comprised of locally elected officials.

good faith reliance on the regional planning process and diligence in pursuing 700 MHz band operations. Nor is this an isolated case, as reflected in recent waiver petitions filed by the States of Colorado and Louisiana that address similar circumstances faced by numerous public safety 700 MHz incumbents in those jurisdictions. This situation can only be fairly rectified if the Commission reconsiders its unreasonable compliance deadlines and adheres to the goals of promoting public safety espoused by both the Commission and by the Communications Act.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September 2007, a copy of the foregoing Petition for Reconsideration of Pierce Transit was served by hand on each of the persons listed on the attached service list.

/s/
Sharon Agranov

SERVICE LIST

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Deborah Taylor Tate
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Robert M. McDowell
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Aaron Goldberger
Office of the Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Bruce Liang Gottlieb
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Renee Crittendon
Office of Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Chris Moore
Office of Commissioner Deborah Taylor Tate
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Angela Giancarlo
Office of Commissioner Robert M. McDowell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Derek Poarch, Chief
Public Safety and Homeland Security Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Erika Olsen, Deputy Bureau Chief
Public Safety and Homeland Security Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Jeff Cohen
Public Safety and Homeland Security Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Carol Simpson
Public Safety and Homeland Security Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Jeannie A. Benfaida
Public Safety and Homeland Security Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Best Copy and Printing, Inc.
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554